IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 23.08.2006

Coram

The Honourable Mr. JUSTICE K.MOHAN RAM

Civil Miscellaneous Appeal No.693 of 1999

The Oriental Insurance Co. Ltd.,
11-A, Ramakrishna Street,
Tambaram West, Chennai - 600 045 ... Appellant(2nd Respondent party in W.C)

Vs.

1. A.S.George Irudaya Selvaraj @ A.S.Selvaraj.

2. Gouthamchand Jain .... Respondents
(Appellant and First Oposite party in W.C)

Appeal against the order dated 30.10.1998 passed in W.C.No.242 of 1996 on the file of Commissioner for Workmen Compensation II - Chennai-6 (Deputy Commissioner of Labour - II).

For Appellant : Mr. R.Sivakumar.
For Respondents : Mr. D.Kanagaraj, for R-1.
No Appearance, for R-2.

J U D G E M E N T

The Oriental Insurance Company Limited, aggrieved by the Order of the Commissioner for Workmen Compensation II (Deputy Commissioner of Labour II) Chennai, dated 30.10.1998 made in W.C.No.242 of 1996 has preferred the above appeal.

2. In respect of grievous injuries sustained in a motor vehicle accident that took place on 17.08.1996, the first respondent herein, as applicant, has prayed for a compensation of Rs.3,50,000/- before the Deputy Commissioner of Labour II. Before the said authority, the applicant himself was examined as A.W.1 and Dr.J.R.R.Thiagarajan was examined as A.W.2 and Exs.A-1 to A-8 were marked in support of the claim for compensation. On the side of the owner of the vehicle, the second respondent was examined as R.W.1 and Exs.R-1 to R-3 have been marked in support of the defence. The authority, after considering all the materials, after holding that the applicant sustained injuries in the course of his employment, based on the evidence of the Doctor, disability and after assessing the loss of earning capacity, directed the Insurance Company to pay a sum of Rs.1,07,094/-. Questioning the above said order, the appellant-Insurance Company has filed the present appeal.

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3. I heard Mr. R.Sivakumar, learned counsel appearing for the appellant and Mr. D.Kanagaraj learned counsel for the contesting first respondent.

4. Mr. R.Sivakumar learned counsel appearing for the appellant-Insurance Company raised the only contention that whether the Learned Deputy Commissioner is correct in coming to the conclusion that the first respondent herein met with an accident and sustained injuries during the course of his employment under the second respondent herein, when the second respondent denies the employment of the first respondent.

5. It is seen from the evidence of the injured/applicant A.W.1 that while he was working as a driver with the second respondent on 17.08.1996, he met with an accident, thereby sustained various injuries. The First Information Report has been marked as Ex.A-1, the Discharge Summary is marked as Ex.A-2, the Wound Certificate is marked as Ex.A-3 and the Legal Notice dated 10.10.1996 is marked as Ex.A-4, the Insurance Policy for the period from 30.06.1996 to 29.06.1997 is marked as Ex.A-5, the Driving Licence of the applicant is marked as Ex.A-6, the Disability Certificate is marked as Ex.A-7 and the X-Ray is marked as Ex.A-8. On the side of the contesting respondent-the first respondent herein, the Hire Purchase Agreement between Goutham Finance and the applicant is marked as Ex.R-1, the Registration Certificate in respect of the car bearing Registration No.TN22-A-9360 is marked as Ex.R-2 and the Insurance Policy for the period from 30.06.1996 to 29.06.1997 is marked as Ex.R-3.

6. It is seen from Ex.R-2-the Registration Certificate that the vehicle in question was transferred to the name of the applicant with effect from 15.07.1996 and the vehicle was re-transferred to the name of the second respondent with effect from 07.08.1996 and the accident has taken place on 17.08.1996. On the date of the accident, it is no doubt true, the second respondent was the owner of the vehicle.

7. It was the specific case of the applicant that he was employed as a driver under the second respondent herein and he met with the accident on 17.08.1996 during the course of his employment and sustained personal injuries. Whereas R.W.1 denied the contention of the applicant and deposed that the applicant-the first respondent herein bought the car from the second respondent on hire purchase as per Hire Purchase Agreement-Ex.R-1. According to R.W.1, since the applicant could not pay the instalments the vehicle was re-transferred to the name of the second respondent and has further stated in his cross examination that the applicant requested the second respondent to take the Car for his personal use and the second respondent acceded to the request of the applicant. Considering such specific contention of the second respondent and also considering the fact that the second respondent had not produced any documentary evidence to disprove the version of the applicant that he was employed as a Driver under the second respondent held that the applicant was employed as a driver under the second respondent on the date of the accident. The said finding of the authority is challenged on the ground that the authority has cast the burden on the second respondent to prove the negative.

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8. The learned counsel for the appellant submitted that when the applicant claims that he was employed as a driver under the second respondent it is the bounden duty of the applicant to prove the same by acceptable evidence. According to the learned counsel, there is absolutely no evidence except the oral evidence of A.W.1 to prove that the applicant was employed as a driver under the second respondent and therefore submitted that the finding of the authority is vitiated and unsustainable.

9. Per contra the learned counsel for the first respondent submitted that within the prescribed period the legal notice as contemplated in the Workmen's Compensation Act was issued by the first respondent under Ex.A-4 through his counsel and for that the second respondent had not sent any reply. The learned counsel further submitted that the second respondent-owner of the vehicle had also not produced any documentary evidence to show that the first respondent was not his driver on the date of the accident. In support of his contention that an adverse inference would be drawn from the failure of the second respondent to send a reply to Ex.A-4-legal notice, he relied upon the decision reported in the case of Guptha Enterprises, Madras Vs. Irusappan and another reported in 2004 (1) L.L.N. 567. In the said decision, in paragraph 7, it is observed as follows:

> "7. The learned counsel appearing for the appellant would point out that the employer and the employee relationship has not been established by the workman. In such circumstances, without considering this aspect, the learned Judge ought not to have passed the order in favour of the workman. In this connection, it is pointed out that even though the workman has not produced the relevant records to establish this fact, however, the workman issued a notice, dated 11 April 1987, to the appellant. In spite of the receipt of the said notice, the appellant has not come forward to issue any reply repudiating the allegations referred in the said notice. It is pointed out that the burden lies only on the appellant to establish that the workman was not at all employed under them. The learned counsel appearing for the first respondent would point out that if the stand taken by the workman is found to be false, the appellant would have produced the relevant records to establish the fact that the first respondent never worked under it at any point of time. Since the appellant has not come forward to produce the relevant documents to establish this fact, considering the circumstances of the case, while deciding the matter, the learned Judge has taken an adverse inference and accordingly the learned Judge came to the conclusion that the first respondent was a workman under the appellant and sustained injuries while he was working under them". (italics supplied)

10. Relying upon the above said observations of the Division Bench the learned counsel for the first respondent submitted that as the second respondent has not chosen to send any reply to Ex.A-4-legal notice and has also not chosen to produce any documents to show that the second

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respondent was not employed under him, an adverse inference should be drawn in favour of the applicant. He further submitted that for the first time in the counter statement the second respondent has taken an untenable stand that the applicant was not a driver under him.

11. In the counter statement filed by the first respondent, the first respondent has taken a specific stand that the applicant was never employed as driver by him and has further stated that on 19.08.1996 the applicant approached and requested him to lend the vehicle for about two days to go to south and taken the vehicle in the morning of that day. It has to be considered as to whether the specific stand taken by the first respondent in the counter statement is acceptable. Admittedly, the vehicle bearing Registration No.TN22-A-9360 was purchased by the applicant under a hire purchase agreement from the second respondent and the applicant was the registered owner. Because he was unable to pay the monthly instalments, he surrendered the vehicle to the second respondent and the ownership of the vehicle was transferred to the name of the second respondent with effect from 07.08.1996 as is evident from the Registration Certificate-Ex.R-2 and the accident had taken place on 17.08.1996. While that being so, whether the second respondent could really have lend the car to the first respondent for his person use? To substantiate that plea, the second respondent has not examined any other witness.

12. In this context when the second respondent had admittedly received the statutory notice-Ex.A-4 from the applicant and if the above plea of the second respondent is true, he would have definitely sent a reply setting out the said plea and denying his liability. But the second respondent has admittedly not sent any reply. Therefore, it could be easily held that the plea put forth by the second respondent in the counter statement is only an after thought. Further the question as to whether the first respondent was a driver employed under the second respondent is not a substantial question of law since the same has to be decided on the appreciation of evidence available on record. Therefore, this court is of the considered view that the finding of the Commissioner for Workmen Compensation II (Deputy Commissioner of Labour II) Chennai that the first respondent was employed as a driver under the second respondent has to be upheld. No other submissions have been made by the learned counsel for the appellant either relating to the quantum of compensation or on other aspects.

13. Therefore the order dated 30.10.1998 passed in W.C.No.242 of 1996 on the file of Commissioner for Workmen Compensation II - Chennai (Deputy Commissioner of Labour-II) is confirmed and the appeal is dismissed. However, there will be no order as to costs.

Sd/
Deputy Registrar (Judicial) I/C

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Sub Asst.Regitrar

srk

To

The Commissioner for Workmen Compensation II
(Deputy Commissioner of Labour - II)
Chennai

1 cc To Mr.D.Kanagaraj, Advocate, SR.38261.

C.M.A. No.693 of 1999

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RVL 08.09.2006

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